No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANT.

The defendant has appealed from the judgment of the district court sentencing him to imprisonment for six months after a jury had found him guilty of violating the Emergency Price Control Act of 1942.

STATEMENT OF JURISDICTION.

Appellant was charged with violating the Emergency Price Control Act of 1942 (50 U.S.C.A. Appx., secs. 902-946), at a place within the jurisdiction of the district court (T. 2-3). The district court had jurisdiction under the Act. (50 U.S.C.A. Appx., sec. 925 (c).)

Final judgment sentencing appellant to imprisonment after conviction was entered in the district court

on February 15, 1944. (T. 10-11.) An appeal therefrom to this court was filed the same day. (T. 11-14.) The jurisdiction of this court to review the final judgment of the district court is therefore sustained by section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The Information against defendant contained a single count, ——unlawful sale to one F. W. Larkin of 100 cases of Baltimore Club Special Reserve Whiskey at a price "in excess of and higher than the maximum price established by law". (T. 2-3.) Parenthetical references were made in the Information to the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 445. (T. 2-3.) Pertinent parts of the said Act and Regulation will be set out verbatim or appropriately summarized in a latter part of this brief. To this Information the appellant entered a plea of "not guilty". (T. 4.)

The Government produced four witnesses at the trial and their testimony may be summarized briefly.

F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed the matter with the appellant. The appellant stated that he would see what he could do to procure some whiskey for him and later the appellant returned and said that he could get ahold of 100 cases of whiskey known as Baltimore Club Special Reserve at a price of $46.00 per case. Larkin then contacted

two other tavern keepers, Mrs. Bertolucci and a Mrs. Baer, and agreed to take this whiskey. According to the witness Larkin, he paid $780.00, Mrs. Bertolucci paid $185.00, and Mrs. Baer gave a third check to make a total amount of $1,975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's Warehouse. The amount paid down represented $19.75 a case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse, but did not receive any whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he heard that there was something illegal in this transaction and that he wanted nothing further to do with it, and he returned Larkin the money that he had paid. (T. 19-25.)

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Co., was called as a witness for the United States. She testified that Rollandelli and Company had purchased a number of cases of Baltimore Club Special Reserve Whiskey from the Gordon O'Neill Co., Incorporated, distillery, at $20.40, f.o.b., that the ceiling price of this whiskey was $26.60 or $27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company sometime in November, and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination, that she did not know Mr. Small, the appellant here, and had never seen

him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin, and he was not a customer of the Company, and she had never heard of him. (T. 16-18.)

George Moncharsh, Chief Enforcement Attorney for the Office of Price Administration in this district, testified that he had a conversation with Mr. Small, the appellant, around the middle of November, 1943, at his office in San Francisco; that he discussed with Mr. Small the matter of the sale of Baltimore Club Special Reserve Whiskey to Mr. Larkin. Mr. Small said he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders' Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell, that was part of his job. (T. 25-26.) Mr. Small said that he knew the ceiling price of the whiskey was somewhere around $27.00; that the whiskey was not delivered to Larkin because the whiskey at Rollandelli's had been tied up by legal proceedings in San Francisco, and that the whiskey he was selling to Larkin was the Baltimore Club Special Reserve at Rollandelli's. (T. 26-28.)

Clyde O. Bird, an Investigator for the Office of Price Administration, testified that he had a con-

versation with the appellant at the Office of Price Administration offices. Appellant then said his part of the transaction of the sale of the Baltimore Club whiskey was to sell it for $46.50 per case and that he was to get $1.75 per case for his commission for selling it; that he sold 100 cases to Larkin and had sold 300 cases to other people whose names he would not tell without consent of his counsel; that he collected approximately $19.50 per case, which he turned over to other parties involved in the transaction and that the ceiling price of $27.00 per case was to be paid to the distributor, Rollandelli; that he knew it was illegal; that he was secretary of the Bartenders' Union and very much interested in seeing that all of its members were employed and that he was primarily interested in getting liquor for them; and that he was to get $1.75 per case for his commission personally to himself. (T. 31-32.)

When the Government rested its case, the appellant also rested (T. 34) and moved for a directed verdict which the court denied and an exception was noted (T. 35). In denying the motion the court said, "I am going to tell the jury that there was no sale but there was an attempted sale". (T. 35.) The information was in no way amended, nor was a count added charging appellant with attempted sale. Among the instructions given to the jury were these:

> "I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title

to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or a contract to sell goods which the seller was unable to carry out." (T. 36.)

"Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him." (T. 38.)

The verdict of the jury was as follows:

"We, the Jury, find T. A. Small, the defendant at the bar Guilty.

J. L. Culpepper
Foreman". (T. 7.)

Following denial of a motion for new trial (T. 7-8), and a motion in arrest of judgment (T. 8-9), the judgment entered by the court contained this provision:

"Ordered and Adjudged that the defendant, T. A. Small, having been convicted on the verdict of the jury of guilty of the offense charged in the Information, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six (6) Months." (T. 11.)

The question presented on the appeal and thus raised by the motion for directed verdict is whether the conviction and judgment are supported by the evidence.

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellant relies upon his assigned errors Nos. I and II. (T. 14.)

ARGUMENT OF THE CASE.

Summary of Argument.

The Information was confined to the charge that appellant unlawfully sold whiskey at a price higher than the maximum price established by law. The evidence was and is admittedly insufficient to support a conviction on that charge. Appellant was therefore entitled to an acquittal on that charge and it was therefore error for the court to deny his motion for a directed verdict. The offense of offering for sale or attempting to sell at a price higher than the maximum price established by law is a separate and distinct crime. Nevertheless, the court told the jury that it could convict appellant of the charge contained in the Information on evidence that he offered for sale or attempted to sell the whiskey. By its verdict, the jury found him guilty of the charge contained in the Information. By its judgment, the court sentenced him to imprisonment on that charge. As the evidence will not support the conviction, the judgment should

be reversed. Moreover, the evidence was and is insufficient in another respect. The evidence did not establish that appellant was a "wholesaler" or subject to the Maximum Price Regulations. For this latter reason the judgment should also be reversed.

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1. THE CONVICTION AND JUDGMENT ARE NOT SUPPORTED BY THE EVIDENCE AND THE JUDGMENT SHOULD THEREFORE BE REVERSED.

Assignment of Error No. I. (T. 14.) That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in the case.

Assignment of Error No. II. (T. 14.) That the Court erred in refusing to instruct the jury to find the defendant Not Guilty.

As stated, the Information contained a single count or charge,—unlawful sale of whiskey at a price higher than the maximum price established by law. (T. 2-3.) That the Emergency Price Control Act of 1942 empowered the Price Administrator to establish maximum prices, is not disputed on this appeal. (50 U.S.C.A. Appx., sec. 902 (a).) Nor is it disputed that the Price Administrator duly established a maximum price for the whiskey involved in the record and that the evidence would support a finding that appellant, if a "wholesaler", offered for sale or attempted to sell the whiskey at a price higher than the maximum price established by law. And it is conceded on the appeal that the offenses of offering for sale or at-

tempting to sell is an equal crime, under the Act, with actual sale and subject to the same penalities. The Act provides:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), *or to offer, solicit, attempt, or agree to do any of the foregoing.*" (50 U.S.C.A. Appx., sec. 904 (a).) (Emphasis added.)
>
> "Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of section 4 (c) (section 904 (c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. * * * " (50 U.S.C.A. Appx., sec. 925 (b).)

From the summary of the evidence appearing in the statement of the case herein it is very apparent that the charge of sale contained in the Information was not substantiated. The evidence was and is insufficient to support a conviction on that charge. Ap-

pellant moved for a directed verdict at the close of the testimony on both sides and his motion was denied and an exception noted. (T. 35.) This motion should have been granted and the error of the court is palpable.

The prejudicial effect of the error is reflected in what subsequently occurred. That the offense of offering for sale or attempting to sell is a separate and distinct crime under the Act, may not be doubted from the first section above quoted. (50 U.S.C.A. Appx., sec. 904 (a).) Thus it has been held that under the Act the charge of offering for sale is not merged in a conviction for unlawful sale under an Information containing two counts, one for unlawful sale and the other for unlawfully offering for sale, and that a defendant may consistently be found guilty on both counts and punished for both. (*United States v. Weiss,* D. C. N. Y., 57 F. Supp. 747, 749.) Here the court told the jury that it could find the appellant guilty of the offense charged in the Information, namely, unlawful sale, on evidence of unlawful offering for sale or attempting to sell. (T. 38.) Here the jury accepted the invitation of the court, its verdict reading, "We, the Jury, find T. A. Small, the defendant at bar Guilty". (T. 7.) This must be interpreted as a verdict that the defendant was guilty of the offense charged in the Information. In this connection it was said in *St. Clair v. United States,* 154 U. S. 134, 14 S. Ct. 1002, 1010, 38 L. Ed. 936:

> "By the Revised Statutes of the United States, it is provided that 'in all criminal cases the de-

fendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided, that such attempt be itself a separate offense.' Section 1035. It is therefore contended that as the verdict was generally, 'Guilty,' and did not, in terms, indicate of what particular offense the accused was found guilty, the judgment should have been arrested. * * * The indictment contained but one charge,—that of murder. The accused was arraigned, and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lessor crime necessarily included within one charged, or of an attempt to commit the offense, the law will support the verdict with a very fair intendment, and therefore will, by construction, supply the words 'as charged in the indictment.' The verdict of 'guilty' in this case will be interpreted as referring to the single offense specified in the indictment, and this principle has been incorporated into the statute laws of some of the states; as in California whose Penal Code declares that a verdict of 'Guilty,' or 'Not Guilty,' shall import a conviction or acquittal of the offense charged in the indictment. Section 1151."

To the same effect is *United States v. Martini,* D.C. Ala. 42 F. Supp. 502, 510, 511.

And here the court sentenced appellant to imprisonment on conviction "of the offense charged in the Information". (T. 11.)

Thus it is plain that although the evidence was and is insufficient to support the charge contained in the Information, the appellant was nevertheless convicted of that charge and faces imprisonment thereon unless this court intervenes and reverses the judgment. The judgment should accordingly be reversed.

Moreover, the insufficiency of the evidence may be demonstrated in another respect. Among the instructions given to the jury were these:

> "I further instruct you that Maximum Price Regulation No. 445, Section 7.8, entitled 'Compliance with this regulation,' provides as follows:
>
> '(a) No buying or selling above maximum prices.
>
> On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade shall buy or receive, any distilled spirits, wines or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.
>
> '(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by any change in style or manner of packing; or in any other way.' " (T. 37.)

> "I further instruct you that Maximum Price Regulation No. 445, Section 5.4, establishes the maximum ceiling price for which wholesalers may sell distilled spirits as follows: The net cost to the wholesaler, plus a 15% markup in addition thereto.
>
> In other words, for illustration, if the total cost to the wholesale(r), let us say, is $24.00 per case, his maximum price for resale to the wholesaler's customers would be fixed by adding 15% to the cost, or 15% of $24.00, a total of $27.60 per case." (T. 37-38.)

To convict the appellant of the offense charged in the Information it was therefore necessary for the Government to establish that appellant was a "wholesaler" within the meaning of the said Regulation. Section 7.12 (b) (3) of the said Regulation defined a "wholesaler" as follows:

> "'Wholesaler' means any person (except a monopoly state or primary distributing agent) *engaged in the business* of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers." (Emphasis added.)

The state of the evidence at the time appellant moved for a directed verdict will not support a finding that he was a "wholesaler" within the meaning of the Regulation, that is, that he was "engaged in the business of buying and selling distilled spirits . . . to persons other than consumers". From the state of the evidence it may not be said that he bought or

sold whiskey, for the evidence established that he neither bought whiskey from Rollandelli's nor sold it to Larkin. The court summed up the situation in the instructions when it said, "The evidence shows that Mr. Small did not have any whiskey, nor could he get it". (T. 38.) His sporadic and abortive efforts to obtain whiskey for others during a whiskey shortage (T. 19) would not convert him into a "wholesaler" engaged in the business of buying and selling whiskey. A single transaction, even though substantial in character, is not sufficient to amount to being "engaged in business". (*Edgewater Realty Co. v. Tenn. Coal, Iron & Railroad Co.,* D.C. Md., 49 F. Supp. 807, 814.) To be "engaged in business" there must be a "progression, continuity, or sustained activity". (*Lewellyn v. Pittsburgh, B. & L. E. R. Co.,* 3 Cir., 222 F. 177, 185.)

Additional reason therefore exists why the motion for directed verdict should have been granted.

CONCLUSION.

That a miscarriage of justice occurred in the trial court, is not susceptible to doubt. The evidence was and is wholly insufficient to support the judgment. In ruling on the motion for directed verdict the trial court recognized that the evidence was insufficient to support the charge contained in the Information. Nevertheless the case went to the jury under instructions which permitted it to find the appellant guilty

of the offense charged in the Information. The jury found him guilty thereof and did not find him guilty of any other offense. On that conviction, and solely on the charge contained in the complaint, the trial court has sentenced appellant to imprisonment. Appellant therefore respectfully submits that the judgment should be reversed.

Dated, San Francisco,
November 23, 1945.

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Attorney for Appellant.